Chapter III: Critical Discussions on "Law and Development"

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CRITICAL DISCUSSIONS ON "LAW AND DEVELOPMENT"

I. HOW WAS "LAW AND DEVELOPMENT" RESEARCH FRAMEWORK DISCUSSED IN INDONESIAN CONTEXT?

As I have discussed at a glance in Chapter I, there are, at least, three concepts about how developing countries such as Indonesia accomplish their "legal development". It is true that the first two concepts—one that has been suggested by David M. Trubek, and the other by Robert B. Seidman—have been being commonly adopted in discussing "Law and Development," while the third concept, Donald Black's concept, is not yet ordinarily discussed when we talk about "Law and Development." However, in my opinion, Donald Black's concept is necessary to discuss as the third after those of David M. Trubek and Robert B. Seidman.

The contention between David Trubek's concept and that of Robert B. Seidman has been expressed by Robert B. Seidman himself (1978: 29) that:

> "There are two common notions about how to change the legal order. One argues that good law in one place is good law anyplace else. It advises the lawmaker to copy the legal order of developed countries in order to achieve development. The other advises that laws make little difference in people's behaviour. Good men, not good laws, make good government. These notions dominated colonial thinking about law. They persisted in modern Africa. As a result either (1) laws were mechanically copied from other contexts, and did not work; or (2) governments did little to change inherited legal order, but instead 'explained' poverty by the 'innate character' of the poor…"

Robert B. Seidman terms his concept "**The Law of non-transferability of Law".** I quote at a sufficiently length Seidman's description about his concept for us to understand thoroughly his own argumentation when he proposed the concept.

Seidman (1978:34) begins his explanation about his concept of "The Law of Non-Transferability of Law" by citing R.S.Jordan and J.P. Renninger (1975) who write that:

> "Legal transplants practically never work. Attaturk introduced the French Civil Code into Turkey: Turkey does not resemble France. Anglophonic Africa, despite the reception of English law, did not develop, as did England. Why this nearly universal failure of transferred law to induce behaviour in its new home similar to that which it induced in its original site?"

Furthermore, Seidman (1978:34-35) writes that:

> "The anthropologist Fredrik Barth has suggested that 'The most simple and general model (of man in society) is one of an aggregate of people exercising choice while influenced by certain constraints and incentives…Our central problem becomes what are the constraints and incentives that canalize choice.' Patterns of social form—i.e. of the repetitive actions of people—can be explained through the assumption that they are 'generated through processes of interaction and in their form reflect the constraints and incentives under which people act."

In his further explanation, Seidman (1978:35) cites M. Tushnet that:

> "Law affects the choices of individuals in two ways. In the first place, each actor perceives the commands of the law as constraints or incentives which he must take into account, either because he believes that it is right and proper that he obey them or, like Holmes's 'bad man', he obeys the law only because of its threats. To each actor, 'the law appears as a factor which affects his decisions but over which he has no control."

Furthermore, Seidman (1978:35) explicates that:

"The law also affects the choices of individuals indirectly. We make our choices about what to do in the light of the repetitive patterns of behaviour of others—i.e. the institutions of the society. I drive on the left hand side of the road not merely because the law commands me to do so, but because I know that others will drive on the left, and therefore I drive there for my own safety. Just as much of my own behaviour is in part a function of the law's commands to me, so is the institutionalized behaviour of others, that so powerfully affects my own behaviour, in part a function of the law's commands to them."

According to Seidman (1978:35):

"Most of the constrains and resources within which individuals choose, however, are of course not a function of the law. Custom, geography, history, technology and a host of other non-legal factors affect my behaviour directly and indirectly by structuring the choice and thus channelling the behaviour of others. These other, non-legal constraints and resources are the reason for the failure of legal transplants. It is as though two hikers were making their way through different forests, each with thickly set underbrush, rocks, swamps, streams, lakes and ravines, and also glades of soft grass, flat places with easy walking, and frequently a well-defined path. The course that each takes through the woods results from his constantly choosing the easiest way to go. Where a forester transports some of the trees from one forest into the other, the path taken by the hiker in that forest might change somewhat, even radically, to avoid the new trees. It could never, however, resemble the path in that other forest from which the trees were transplanted. The rocks, swamps, streams, and other determinants of the hikers' routes are too different."

Finally, Seidman (1978:35-36) states that:

> "So with the transplantation of law. In acting, individuals take some account of the constraints and incentives offered by the law. They also take into account a host of non-legal factors. A particular law in two places with different social, political, economic and other circumstances can therefore only by coincidence induce similar behaviour in both places. English law failed to recreate in Africa anything resembling English society and the English economy because of the vast difference between all the other, non-legal institutions of England and of Africa. English law's principal economic institution was contract. Contract law assumes that each actor seeks his individual advantage. Nineteenth-century English society as a whole embodied such constraints and resources that its entrepreneurs made choices that produced history's most rapid economic development. In Africa, British entrepreneurs faced quite different institutions, posing a different set of constraints and rewards. When England was undergoing development, the local English market offered the greatest rewards for the entrepreneur. When Africa was being developed, England, not the local, African market, offered the greatest rewards. The export-oriented, dual economies of tropical Africa resulted from English entrepreneurs seizing the advantage."

Seidman (1978:36) makes the summary of "The Law of Non-Transferability of Law" as follows:

1. Laws are addressed to addressees (here called 'role-occupants'), prescribing their behaviour.
2. How a role-occupant acts in response to rules of law is a function not only of their prescriptions but also of his physical environment and of the complex of social, political, economic and other institutions within which he makes his choices about how to behave.
3. The physical and institutional environments of different sets of role-occupants differ from time to time and place to place.

4. Therefore, the activity induced by rules of law is usually specific to time and place.
5. Therefore, the same rules of law and their sanctions in different times and places, with different physical and institutional environments will not induce the same bhaviour in role-occupants in different times and places.

Beside the two "grand theories" that are extremely contradictory and commonly adopted by the literature discussing the issue of "law and development" as I have mentioned in Chapter I, there are still two other concepts about how law functions in the development of developing countries like Indonesia, namely Donald Black's **delegalization** theory and the concept of "Indonesian Traditional Customary Law" proposed by Indonesian experts who take forward the use of Indonesian traditional law in accomplishing legal development and legal reform.

In case of "Law and Development" in Indonesia, in my opinion, the four concepts need to be combined proportionally. Despite my description at a glimpse in Chapter I, what I mean here may be briefly stated as follows:

a. David M. Trubek's concept that suggests developing countries wanting to accomplish legal development and legal reform to directly transfer advanced countries's laws, in my opinion, may be applied to certain legal fields with more universal and global nuances. For example, if Indonesia wants to generate legal provisions in the field of "cyber law", given the universal nuance of "cyber law", it is no mistake for us, for the sake of efficiency, to directly transfer the provisions of "cyber law" from such advanced countries as USA.
b. Robert B. Seidman's concept of "The Law on Non-transferrability of Law", may be also applied when we have to be more selectively distinguish which institutions, principles, and regulations of foreign law are in agreement with the living values and the needs of Indonesian society and those that are not. Suitable legal institutions, principles as well as regulations may be directly transferred into Indonesian legal system; in contrast, those considered to be in disagreement should be refused, or, at least, should be revised and adapted to the needs and

values of Indonesian law.

c. The "**delegalization"** concept proposed by Donald Black, is also sufficiently effective to be adopted into the fields of law with business nuances, in which it is felt that the procedures of litigation are not advantageous from business point of view. Accordingly, **alternative dispute resolution (henceforth is abbreviated as ADR)** such as conciliation, mediation, and arbitration, that are no other than forms of delegalization, are sufficiently proper to apply. About these ADR, I will discuss in more details in Chapter V.

d. Principles and rules of "Indonesia Traditional Customary Law" may be still used also in the fields of family law such as marital and divorce law.

II. CAN LAW BECOME THE VITAL MEANS TO ACHIEVE DEVELOPMENT IN INDONESIA?

This sub-chapter will discuss the questions: " Can law become the vital means to achieve development in Indonesia?" and "What does development mean in Indonesia concept or sociological values?"

To answer both questions mentioned above, we must, at first, determine: What we mean by "law" here?

For the purpose of the discussion about "Law and Development", I want to use Wortley's definition of law (see, Achmad Ali 1996:41):

> "Law is the collective term for the rules of conduct for men living in a legal order… An effective system of law is one where the rules are likely to be followed."

I want to emphasize the element of "an effective system of law is one where the rules are likely to be followed." With this emphasis I want to refuse those who identify law as merely in form of "written law"; indeed, law is broader, encompassing written law, unwritten law, and judicial decisions. Therefore, when we discuss "law and development," what we mean is all law mentioned above. Even more, what we mean by

legal development was the development of the substance, structure, and culture of law (borrowing Lawrence M. Friedman).

For law become the vital means to achieve development in Indonesia, decision-makers of Indonesian legal development should thoroughly understand that the present condition of Indonesia is different from that of advanced countries when they initiated their legal development in the past. In the following, I can present a number of examples showing that problems and demands of legal development in every country are so varied that it is impossible for us to apply a uniform style. For law to become the vital means to achieve development, then, the relationships among law and society must be carefully studied in order to understand their consequences for law and development in their society. In order to develop knowledge about law and development, we must first recognize that there are different ways in which we can ask and answer questions about how law and development are related to one another.

For example, popular movements and shifting relations of political and economy power are sweeping away past divisions and conflicts. As has been suggested by Flacks (1988), the Cold War order that shaped the control and use of material resources, political and economic organization, and ways of thinking from the end of World War II in 1945 has collapsed. In its wake, the world today is going through epoch-making changes. In Europe, in the countries of the former Soviet Union, in South Africa, Latin America, and China, a variety of demands and struggles for constitutional democracy; a richer material life; national autonomy; social institutions such as trade unions, professional associations, universities, churches and political parties that are independent of the state are shaping history. These struggles are bearing fruit in the form of political freedom and individual liberty in the everyday lives of people. At the same time, a host of problems are surfacing; economic hardships, class and gender conflicts, and the opening of historic ethnic and national animosities. The handshake of Prime Minister Yitzhak Rabin of Israel and Yaser Araft, Chairman of the Palestine Lberation Organization, symbolizes hopeful change: the hatred and bloodshed among the peoples in the former Yugoslavia reveals the human capacity for aggression and brutality (Gerald Turkel, 1996:3).

Central to these changes are renewed attempts to use law in forming just, democratic, and economically vibrant societies that value diversity among individuals and groups and that recognize the importance to human survival of relationships among social and economic processes and the natural world. In Central Europe, the concern

with law that limits the power of the state and that establishes political equality has been ushered in by people like former President Vaclav Havel of the Czech Republic, who spent years in prison because of his opposition to the Communist state. In the former Soviet Union, efforts to establish legal states to replace the Communist Party state have been largely successful. Basic to this vision is the effort to create a legal system that is independent from political parties and bureaucratic sources of power. In China, efforts to modernize and decentralize the economy have led to emergence of legal institutions such as courts and the legal profession to deal with conflicts over contracts and property. This, in turn, has opened up wider conflicts over democratizing political institutions. In South Africa, Nelson Mandela, the former leader of the African National Congress and the first elected black president, has been dismantling racism through a combination of political action, economic pressure, and negotiation with former President Botha and the National Party. This is being done, in part, by establishing constitutional grounds to equal rights for all citizens under a regime of law. In Latin America, popularly elected governments have emerged that promise to limit the power of wealthy oligarchies and the military over society and to resolve conflicts through law and legal institutions. (Gerald Turkel, 1996:3-4).

The specific condition of Indonesia is clearly different from the above-mentioned examples. President Suharto was "overthrown" **(**di "lengser"kan), leaving this country with very bad economic, social, and political conditions, including legal condition. Habibie who replaced Suharto's position also failed to satisfy peoples' expectations; even during his 18-month tenure in power, the legal condition and law enforcement in Indonesia increasingly deteriorated.

Next, Duet Gus Dur-Megawati stepped up to the national leadership stage of Indonesia as a result of an Election **(Pemilu)**. However, the ascension of the Duet did not really led to a genuinely new government, because there were still many figures of Suharto's regime participating, even assuming top position, for example Akbar Tanjung, who presently still serves as the Speaker of the House of Representatives of the Republic of Indonesia, and Marzuki Darusman, who presently serves as the Attorney General.

Therefore, following Kritz's terms (1995:66), Indonesia is in the condition of a "transplacement" government – a government whose elements were combination of new figures with a high commitment to democracy and figures of the previous regime, who, of course, have difficulties to change their old paradigm, that has been frozen

within their personalities, without mentioning their tendency to conceal their defective past "track records". Conflicts between political elites go on, despite the increasingly worse life of common peoples.

Too positivistic thinking that, among others, conspicuously emphasizes the "procedure" in law enforcement, added with corruptive mental of law enforcement figures, has produced judicial decisions the results of which disappoint peoples, especially those relating to **"kelas kakap" (big-time)** corruption cases. The result is, the increasingly worse image of law enforcers in the eyes of peoples, and in turn, leading to the lost of peoples' confidence in legal institutions as well as other formal institutions that eventually, results in the tendency for some of Indonesian peoples to practice **"tindakan main hakim sendiri" (to exercise unlawful actions toward someone else guilty of something, or "eignrichting")**. Riots occur everywhere. All of these inevitably also put impacts on Indonesia's economy. The Rupiah has been always dropped to become weak. The crisis of confidence does not only occur among the members of Indonesian society, it is also felt by other countries.

In my opinion, to initiate Indonesian legal development, and to give law a role in Indonesian development, the first thing to do is **how to restore the confidence of Indonesian peoples in Government and law enforces.** And the way is, first, that something should be done to cleanse the dirty-broom figures who are still roaming about in law enforcement institutions and state institutions. One of these efforts has been carried out, namely the entry of 27 Justices into the setting of the Supreme Court of Indonesia. However, the same endeavour is not yet performed within the body of the Office of Attorney General, despite the fact that, in my opinion, the Office of Attorney General of the Republic of Indonesia constitutes the "spearhead" of the KKN (Corruption, Collusion, Nepotism) eradication in Indonesia.

It is only after the accomplishment of the above mentioned efforts that, in my opinion, we can think about; how to create legislation that are in agreement with values living within Indonesian society, because it is laws in agreement with the intrinsic values of society that will be obeyed meticulously by the people.

We should not forget that legal awareness, legal obedience, and legal effectiveness constituted three interrelated legal elements. Frequently, people mix up confusingly between "legal awareness" and "legal obedience", despite the fact that, in my opinion, both elements are not precisely the same, although closely interrelated. It is

true that both elements mostly determine whether the implementation of law and legislation in society is effective or not.

Krabbe (Paul Scholten, 1954:166) provides an explanation about legal awareness:

> "Met den term rechtsbewustzijn meent men dan niet het rechtsoordeel over eenig concreet geval, doch het in ieder mensch levend bewustzijn van wat recht is of behoort tezijn, een bepaalde categorie van ons geestesleven, waardoor wij met onmiddelijke evidentie los van positieve instellingen scheiding maken tusschen recht en onrecht, gelijk we dat doen en onwaar, goed en kwaad, schoon en leelijk. "

Thus, according to Krabbe, legal awareness is actually the awareness or values within the self of the human being about the existing law or law that is expected to exist.

In my own opinion, Krabbe's definition above has sufficiently explained about what legal awareness to be. This definition should be more perfect with the addition of the "societal values" element about what functions should be performed by law in the society, as expressed by Paul Scholten (1954:168-169):

> "De term rechtsbewustzijn is dubbelzinnig. Hij duidt ten eerste categorie van het individuele geestesleven aan, doch dient tegelijk om het gemeenschappelijke in oordelen in een bepaalden kring aan te ijzen…Wat we 'rechtsbewustzijn' noemen is in dit verbandt niet anders dan een min of meer vage voorstelling omtrent wat recht behoort te zijn."

Thus, legal awareness possessed by members of society is not a guarantee that the community will obey a rule of law or legislation. One's awareness that stealing is "wrong" or "criminal" does not necessarily lead the person not to steal; when a demand forces him—for example, if he does not steal his only severely ill beloved child should die—he should do the crime for having no funds for the medical treatment.

I my self distinguish legal awareness as follows:

a. virtuous legal awareness.

b. Evil legal awareness.

One example of evil legal awareness is a person who with his increasingly broader knowledge of law knows the possibility to make use of appeal and cassation, despite his consciousness that he stands behind the wrong party. This evil legal awareness, in my opinion, constitutes one of the causes of increasingly over-accumulated cases in the docket of the Supreme Court of the Republic of Indonesia.

Legal obedience itself may still be differentiated in its quality into three types, as have been suggested by H.C.Kelman (1966:140-148):

a. Obedience of **compliance** nature, namly when a person obeys a rule or norms because he is afraid of the sanction.
b. Obedience of **identification** nature, namely when a person obeys a rule or norms because he is afraid that otherwise his relationships with someone may be broken.
c. Obedience of **internalization** nature, namly, when a person obeys a rule or norms because he truly feels that the rule is in agreement with inrinsic values he adheres.

When is a rule or legislation deemed to be ineffective? The answer is, of course, when the majority of the community members do not obey it. However, suppose that the majority of the community members appear to observe the rule or legislation, the effectiveness magnitude or quality of the rule or legislation is still questionable.

In other word, after knowing the three types of obedience, we can no more merely use the magnitude of obedience to a rule or legislation as the parameter of its effectiveness; on the contrary, at least there should exist differences of effectiveness quality of a rule or legislation. The more members of society who obey a rule or legislation in merely **compliance** or **identification** manners indicate merely low effectiveness of the rule or legislation; on the contrary, the more members of society obey a rule or legislation in an **internalization** manner, the higher the quality of effectiveness of the rule or legislation.

So, the question “Can law become the vital means to achieve development in Indonesia?” may be answered “Yes” if the majority of society members, if the majority of development implementers, already obey law in **internalization** quality.

In my opinion, the meaning of the current development is identical with **modernization,** so that the meaning of legal development is modernization in the field of law that, in the concrete form, means to develop the obedience level of community members to reach the level of **internalization.**

It is necessary to note that, a modern legal structure does not only depend on legislation and efficient and effective legal bureaux, but most of all on a modern judicial system and also on the participation of all members of society. Especially in Indonesian case, beside the weaknesses in the field of legislation, something that has been mostly highlighted by society is the poor performance of the courts. A modern judicial system will ensure that the courts will conduct and facilitate a speedy adjudication of disputes for those who litigate in the courts. Therefore, I am in support of the opinion that, in the process of development and modernization of the legal structure in Indonesia, developing the judicial system into a modern system should be the apex of that development.

Once again, modernization and development of law in Indonesia should begin with a thorough "political will" of Government for that. Modernization of the total legal structure in Indonesia will depend among others on the legal professional who are manning the system and the political will of the government to give priority to the development of law.

Law should be functioned optimally. An illustration of the optimized functions of law may be seen, among others, in the functions of law suggested by Charles Sampford (1989:110-111):

1. ***'Dispute resolution'*** – a function of courts and law firms.
2. ***'Reinforcement'*** or 'reinstitutionalization' (Bohannan,1968) of existing practices within the community by framing rules that equate to those practices and by providing the means for their 'facilitation' (Summers,1977 : 127)- a function of courts and legislatures.
3. ***'Change in existing practices'*** (Schur,1968 : 75)- by legislatures and,sometimes,courts.
4. ***'Guidance'*** or 'education' (Chambliss and Seidman, 1971:9)- again, by the legislature and courts.
5. ***'Regulation'*** , the administrative control of various private institutions- by the bureaucracy.

6. **‘Participation by the state in social and economic affairs’** by the bureaucracy.
7. ***‘Punishment’*** , retribution or vengeance against perceived wrong-doers, reinforcement of existing social values—by courts and penal institutions.
8. ***‘Maintaining social peace’*** (or, more loosely, ‘social order’ or ‘social control’) –by police and penal institutions to the extent that they isolate some and deter some other potentially violent individuals.
9. ***‘Legitimation’*** of existing social institution—supposedly achieved by courts.

Another meaning of legal development is highlighted through sociological optics, namely, that socialization and communication of law and legislation should be optimized.

Prior to the discussion of a draft (RUU) in the House of People’s Representatives, especially when the will-be rule is in form of an Act, it should be, in the first instance, socialized within society members, so that the will-be-born Act (UU) is not contradictory to the “values living in society”. In the same manner, after being discussed over deeply in the House of People’s Representative, before its enactment, once again, the draft (RUU) should be socialized so that it will thoroughly absorb the aspirations of society at large. Hastiness in producing any Act should be avoided, because an Act that is given birth in haste will be only of the quality of “sweep legislation”, borrowing Gunnar Myrdal’s term.

There are three prerequisites for a rule of law or legislation to be observed by society members:

a. The members of society should know the existence of the rule of law;
b. The mmbers of society should know the content of the rule of law;
c. The members of society should percept the advantage and satisfaction from their obedience to the rule of law.

Therefore, or the existence and the content of a rule of law to be known by society members, a socialization process is necessary when the rule of law is effective, because socialization of any rule of law should aim to:

a. How to make society members know the presence of legislation or

regulations.

b. How to make society members know the content of legislation or regulations.
c. How to make society members able of channeling their aspirations to be contained within the content of legislation.
d. How to make society members able of adapting themselves (their frame of thinking and behavior) to the goal legislation wants.

III. THE "LAW AND JUSTICE" IN INDONESIA

I regret that most books discussing "Law and Development" do not at all mention the discussion about the "justice" factor in its relation to development, despite the fact that, in my opinion, injustice development constitutes merely development with fragile foundations, such as one performed by President Suharto with his concept of "REPELITA" (the Five-Year Development Plant) that ended with the fall out of Indonesian economy and the "step-down" of Suharto from the peak of power in Indonesia. Indeed, the issue of justice was always echoed by Suharto and ministers as ell officials of his regime; however, the issue just constituted a logan, despite the reality that everywhere injustice practices went on in the course of development carried out by Suharto's regime.

To initiate discussion about the justice factor in its relation to "law and development" in Indonesia, I will, firstly, put forward several definitions of justice commonly used in the literature of law.

A. DEFINITIONS OF JUSTICE

To determine what is "just" and what is "unjust" is not an easy matter. It is true of what has been expressed by L.B. Curzon (1979:37):

> "Can justice be defined? The difficulties inherent in the definition of concepts such as 'law'…they apply equally to the definition of 'justice'. Additionally, there is the difficulty presented by jurists who stress the fact that those norms employed as standards of

justice may vary from one individual to another so that they are often impossible to reconcile; indeed, they may be no more than emotively expressed ideals without descriptive meaning.

(a) “Only relative values are accessible to human reason; and that means that the judgment to the effect that something is just cannot be made with the claim of excluding the possibility of a contrary judgment of value. Absolute justice is an irrational ideal or, what amounts to the same, an illusion”: Kelsen .

(b) “To invoke justice is the same thing as banging on the table;an emotional expression which turns one’s demands into an absolute postulate”:Ross.

Next, L.B. Curzon (1979:37-38) quotes some definitions/descriptions from the literature of jurisprudence. The following are of interest：

(a) “Justice is a political virtue, by the rules of it the state is regulated and these rules are the criterion of what is right”: Aristotle.

(b) “The virtue which results in each person receiving his due”: Justinian.

(c) “The idea of justice supposes two things: a rule of conduct and sentiment which sanctions the rule. The first must be supposed common to all mankind and intended for their good; the sentimen is a desire that punishment may be uffered by those who infringe the rule”: Mill.

(d) “Justice has always weighted the scales solely in favour of the weak and the persecuted. A just decision is a decision based on grounds which appeal to a disinterested person”: Ehrlich.

(e) “Who or whatever renders to every man his due,that person or thing is just; an attitude, an institution, a law, a relationship,in which every man is given his due is just”: Brunner.

(f) “Justice requires that freedom, equality and security be accorded to human beings to the greatest extent consistent with

the common good": Bodenheimer.

(g) "Justice is the correct application of a law, as opposed to arbitrariness":Ross.

(h) "Justice among men involves an impartial and fearless act of choosing a solution for a dispute within a legal order,having regard to the human rights which that order protects": Wortley.

B. TYPES OF JUSTICE AND LEGAL REFORM IN INDONESIA

Irrespective of debates over definitions of justice, various literatures also distinguishes types of justice, one of which is suggested by Aristotle (Curzon,1979:38):

"(a) ***Distributive Justice*** is concerned essentially with the allocation of rights, duties and burdens among the members of a community so that equilibrium is ensured. It involves the equal treatment of those equal before the law.

(b) ***Corrective,or remedial, justice*** corrects any disequilibrium in the community by restoring whatever equality existed before a wrong was committed".

For the purpose of the discussion about "law and development" in Indonesia, I myself will distinguish three types of justice as the following:

a. **Procedural Justice**.
b. **Substantial Justice.**
c. **Transitional Justice.**

Procedural Justice is justice resulting from a formal legal process, that does not necessarily fit the "sense of justice" of the society at large, for example when a defendant of a corruption case is decided free by the judge not because he has not, in fact, committed the crime, but merely because he has bribed the judge. The acquittal decision by the judges for the defendant is, from the optics of **"procedural justice"**, considered to be just; however, from the optics of **"substantial justice,"** the decision of acquittal is considered to be contradictory to the sense of justice. Thus, what means by **substantial justice** is the essential justice that is not confined to the formal

procedure solely. In the above-mentioned example, it is substantial justice if the defendant is sentenced severely.

To be more clearly, ***substantial justice***, according to Majid Khadduri (1999:201) is:

> "an internal aspect of some law; and the justice elements contained in some law constitute a declaration of "truth" and "wrongs". In Islamic vocabularies, the "truth" and the "wrong" are called, respectively, 'halal' and 'haram' (al-halal wa al-haram) and constitute some general and specific rules…"

I will discuss ***Transitional Justice*** in specific in Chapter IV, New Paradigm of Law and Development in Indonesia.

The biggest mistake of the New Order government's (Suharto's regime) policies was the over-reliance on procedural justice, and, in the same time, the long practices, more than thirty two years, of "nepotism", in which the economy was monopolized by the Cendana Family (Suharto, his children and his grandchildren) hand in hand with giant conglomerates of Suharto's cronies such as Liem Siao Liong, Bob Hasan, Abdul Latief and so on. Justice in form of even distribution of economic welfare being desired by peoples at large did never come.

Peoples were removed from their lands on the reason of "for the sake of common interests" that, although with compensation, the worth provided to them did not match the value of their lands. Under the New Order, land was appropriated for large-scale development, often after bloody clashes with landholders, while long-running disputes over compensation and rights of occupancy went unresolved, in some cases for decades. The seriousness of injustices in land problems in Indonesia during Suharto's era was accurately stated, in late 1995 Indonesia's respected English language daily, the ***Jakarta Post*** (4 November 1995) observed in an editorial that 'the land problem in this country could become a social time bomb if it is not handled with care.'

The above-mentioned prediction had come true in reality. Anton Lucas and Carol Warren (in Chris Manning & Peter van Diermen, ed, 2000: 220-221) write that:

> "Since Suharto's demise, these unresolved agrarian tensions have exploded in many areas as part of widespread demonstrations

> and public confrontations with officials, in scenes unthinkable during the Suharto era. Farmers opened irrigation channels to gain more access to irrigation water in Aceh (Kompas, 8 December 1998), and attacked and burned the property of a landlord in Riau (Republika, 7 December 1998). They pulled up sugar cane on disputed land in East Java, occupied oil palm plantations, and harvested coffee and other crops belonging to state-owned plantations. Plantations as well as land acquired for as yet unrealised developments have been reoccupied across the country and planted with food crops such as maize and corn. Farmers have also occupied, surveyed and redistributed disputed land in North Sumatra, Bali, Lombok, and other regions, including part of Suharto's ranch at Tapos in West Java, although not without resistance from local authorities. While many of these actions are, in part, responses to the economic crisis as it became a food crisis in many communities, protests about corruption, unfair compensation payments for land compulsorily acquired and the role of the military in land acquisition (Surya, 21-23 September 1998; Jawa Pos, 24 September 1998) are expressions of longstanding unrest over unresolved agrarian disputes throughout the country."

Furthermore, Anton Lucas and Carol Warren (2000:223-225) explain clearly land dispute cases in Indonesia. Partly because the policy reforms recommended in the above two policy documents were never implemented—because of potential conflict with the vested interests of power holders—land disputes comprised the largest number of cases dealt with by the newly established National Human Rights Commission (Komnas HAM) and Administrative Courts by the 1990s (see Table 4). Between July 1994 and September 1996, Komnas HAM (1997) recorded 891 incidents of human rights abuses involving land expropriation, collated from report in 28 regional newspapers. The national postal complaints system recorded 590 land complaints in 1997, two and a half times as many as the year before (***Business News,*** 2 January 1998). The National Land Agency (BPN) recorded 1.395 complaints submitted in writing or in person for the six-month period to the end of 1998 (BPN 1999a, 1999b).

Annually published Human Rights Commission data on land cases handled since its establishment in 1994 are also indicative of escalating incidents, or at least of

their visibility, and of the popular resistance that contributed to the collapse of the Suharto regime. In 1994 the Commission dealt with 101 complaints involving land issues. This rose steadily to reach 351 in 1997, a three-fold increase over the final four years of the New Order (See, Table 4 below).

Table 4 : Land Cases Submitted to the Jakarta Administrative Court and National Human Rights Commission

	1991	1992	1993	1994	1995	1996	1997	1998
Jakarta Court								
No.	37	53	35	30	40	56	55	40
(%)	(22.3)	(25.6)	(22.4)	(19.0)	(23.4)	(29.3)	(33.7)	(30.8)
Total (all cases)	166	207	156	158	171	191	163	130
Human Rights Commission								
No.	-	-	-	101	178	327	351	339
(%)	-	-	-	(17.7)	(20.5)	(23.3)	(32.1)	(27.8)
Total (all cases)	-	-	-	572	867	1.406	1.093	1.221

***** These statistics represent new cases submitted to the Jakarta branch of the Administrative Court only and do not include cases carried over from previous years, which typically represent half the annual case load. There are 24 categories of human rights cases, of which land (**pertanahan**) represented the largest number in all but two years (1991 and 1994), when housing and civil service cases outstripped it.

** These figures represent completed cases dealing with land issues out of total completed cases for he six categories reported :land, labour, official abuses, housing, religion and other (Komnas HAM 1996:8; 1997:29; 1998:38). Approximately 30 percent of complaints submitted were unresolved and carried over to the following year's case load.

(Source: Anton Lucas and Carol Warren, 2000:224).

According to Anton Lucas and Carol Warren (2000:224-225):

"In Indonesia's economic crisis (YLBHI 1998:8), of the 553 cases its Land and Environment Division dealt with in the year that brought the demise of the New Order, 26 per cent concerned land

conflicts arising from the establishment of large-scale plantations, 23 per cent land clearance for industrial, residential and tourist projects, and 13 per cent forest, mining and aquaculture developments (YLBHI 1998:1-4). The remaining 'non-structural' cases included the issuance of false land certificates, road expansion and misappropriation by government officials. The disputes dealt with by the Legal Aid Foundation in 1998 alone involved a total of 827.000 hectares of land, and affected the livelihood of more than a million people (see, Table 5 below)."

Table 5: Land Cases Handled by the Legal Aid Foundation for 14 Provinces, 1998

Province	Cases (no.)	Land Area (ha)	Households Affected (no.)
1. West Java	28	3.422	2.887
2. DKI Jakarta	116	637	844
3. Central Java	23	1.083	1.241
4. DI Yogyakarta	4	1.057	572
5. East Java	60	1.050	5.632
Subtotal			
No.	231	7.249	11.176
(%)	(41.8)	(0.9)	(5.2)
6. DI Aceh	7	59.985	4.254
7. North Sumatra	42	113.050	53.727
8. West Sumatra	12	15.483	1.612
9. South Sumatra	135	195.585	26.284
10. Lampung	73	253.122	98.846
11. Bali	9	285	684
12. South Sulawesi	12	13.110	2.382
13. North Sulawesi	15	32.285	6.593
14. Irian Jaya	17	137.197	8.798
Subtotal			
No.	322	820.102	203.180
(%)	(58.2)	(99.1)	(94.8)
Total	553	827.351	214.356
	(100)	(100)	(100)

The Legal Aid Foundation report (YLBHI 1998) provides what little information is available on the regional distribution of land conflicts. It reveals that in 1998, 58 per cent of the 553 cases it dealt with across 14 of Indonesia's then 27

provinces were located outside Java. However, more than 99 per cent of the total land area and 95 per cent of the total households affected were in these Outer Island provinces (See, Table 5).

Due to injustices perceived by the peoples under Suharto regime, criticisms against injustices in the agrarian field were glittering during the reform era. Among the most spectacular signals of the dramatic nature of political change during the last months of the Suharto regime, and the transitional interregnum, were the direct actions of aggrieved local groups. These included purging officials accused of corruption and collusion with the Suharto regime, and reasserting claims to and reoccupying lands lost to the mega-projects of the late New Order. Almost immediately after Suharto's fall from grace, the occupation of the Suharto ranch at Tapos near Bogor and the Cibodas golf course by displaced farmers captured national media attention. The farmers of Cibodas, part of the rapidly developing resort area of Puncak Pass and a playground of Jakarta's new rich, had been forcibly removed from their land with compensation of only a few cents per square metre a decade earlier. On resuming control of part of their former lands, they engraved ***tanah rakyat*** (people's land) into the fairway, asserting 'the people's claims to a greater stake in the post-New Order scheme of things (see, Anton Lucas & Carol Warren (2000:227-228).

Therefore, we can conclude that justice required in legal development and reform in Indonesia is not merely procedural justice, but also substantive justice. And, especially in the present transitional era, "transitional justice" should be implemented, as I will discuss it in Chapter IV.

Injustice development carried out by a regime always ends with the collapse of the regime. Aristotle has ever said that:

> " Man, when perfected, is the best of animals, but when separated from the law and justice, he is the worst of all."